United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

77-1485

United States Court of Appeals

For the Second Circuit

Docket No. 77-1485

UNITED STATES OF AMERICA,

Appellee,

against

GEORGE NICHOLAS,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF AND APPENDIX

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DEC 8 1977

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

GEORGE NICHOLAS,

Defendant-Appellant.

- - - - - - - - - - - - - - - - - -

BRIEF OF DEFENDANT-APPELLANT GEORGE NICHOLAS

Preliminary Statement

The defendant GEORGE NICHOLAS appeals from the terms of a judgment rendered in the United States District Court for the Southern District of New York on October 21, 1977 (Hon. Charles E. Stewart, J., U,S.D.J.), which based on a prior plea of guilty (P.14-P.18)* taken on September 20, 1977, wherein both

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* Numerals in parenthesis preceded by letter "P"refer to the page numbers of the transcript of the pleas of guilty, numerals preceded by the letter "S" refer to the page numbers of the transcript of the sentence and those preceded by the letter "H" refer to the page numbers of the suppression hearing.
Numerals in parenthesis preceded by letter "R" refer to the document number of the item referred to in the record.
Numerals followed by letter "a"refer to page number of the appendix to this brief.

defendants' *rights of appeal from denials of various pre-trial motions were preserved by stipulation with the Assistant United States Attorney and consent of the Court (P.2,P.3,P.18), adjudged defendant-appellant GEORGE NICHOLAS guilty of a violation of Title 18, U.S.C. §§ 472 and 2 (possession of and concealment of counterfeit obligations of the United States) and sentenced him to a term of imprisonment for a term of three years (S.9).

The Indictment herein (5a),which contains one count, charges that the defendants VINCENT BROWN and GEORGE NICHOLAS unlawfully, wilfully and knowingly, and with intent to defraud, did keep in their possession and conceal on or about May 1, 1973, in the Southern District of New York,certain falsely made, forged and counterfeited obligations and securities of the United States, to wit: Fifty counterfeit Twenty Dollar Federal Reserve Notes bearing the Serial Number E72111743A in violation of 18 U.S.C. 472,2.

The appellant GEORGE NICHOLAS is presently incarcerated and is serving the judgment of conviction being appealed. He has not been able to raise bail in the sum of $5,000.00 fixed in the United States District Court as bail both prior to the imposition of judgment and as bail pending appeal.

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* The co-defendant VINCENT BROWN was also indicted with appellant, participated in the suppression hearing along with him and pled guilty with him. The co-defendant VINCENT BROWN, who was free on bail and still is, was sentenced on November 3, 1977, to a term of three years imprisonment.

This case was assigned to Hon. Charles E. Stewart, Jr., U.S.D.J. who conducted the pre-trial hearings and who accepted the pleas of guilty and imposed the judgments being appealed.

Issues Presented For Review

1. Was appellant granted de facto immunity in exchange for his cooperation with the Government and therefore should his motion for dismissal of the indictment on that ground have been granted or in the alternative, should all statements made in furtherence of the agreement to cooperate and as part of said agreement, have been suppressed?

2. Was the physical evidence sought to be suppressed, the fifty Counterfeit Federal Reserve Notes, the fruits of an illegal search and seizure and was error therefore committed by the United States District Court in denying after a hearing, the motion to suppress such physical evidence?

3. Was error committed by the United States District Court in denying Appellant's motion to suppress various statements attributed to him as having been taken by law enforcement officials in violation of his Constitutional (Miranda) Rights?

4. Was error committed by the United States District Court in denying Appellant's motion to dismiss because of denial of his right to a speedy trial?

5. Under the circumstances of this case, was the imposition of a three year term of imprisonment, excessive ?

Concise Statement Of The Case

The Pretrial Motions-This appeal concerns various pre-trial motions that were the subject of hearings before the United States District Court on September 6, 15, 19 and 20, 1977, and with regard to which rights to appeal were reserved to defendants on their pleas of guilty. More particularly, the motions referred to with regard to appellant are his motions brought on by notice of motion dated July 29, 1977 (R.14) wherein suppression of statements made by appellant to law enforcement officials was sought,as having been obtained in violation of his Constitutional Rights,and of physical evidence, consisting of fifty Counterfeit Federal Reserve Notes, on the ground that they are the fruits of an illegal search and seizure.

Subsequently, and in the course of the hearings on the aforementioned motions, at the suggestion of the Court (8a), and by supplemental notice of motion dated September 8, 1977, appellant supplemented his earlier motions with a motion for an order pursuant to FRCP Rule 12 (b) dismissing the indictment and continued prosecution of appellant based on promises by representatives of th. Government of de facto immunity in exchange for cooperation that was furnished in reliance on said promise (R.23).

Toward the conclusion of the hearings and after colloquy

and reference to the Court files (H.292-296,H.298,H.311-317), a motion was made on behalf of appellant to dismiss the indictment because of the failure of the Government to comply with the Speedy Trial Act (H,317) and the Rules of this Court on that subject.

THE HEARINGS-The Governm ase

Detective Francis Kollmann of the N.Y.C. Police Dept., The first witness, testified as follows: that on May 1, 1973, he was a ember of the Auto Crime Unit of the N.Y.C. Police Dept. and that among his duties was the recovery of stolen motor vehicles and their identification; that on that date he was assigned to the 20th Precinct which covers the West Side of Manhattan from 59th to 86th Streets; that he was with Detectives Santoli and Smith in a radio patrol car making checks of motor vehicles (H.7,H.8) and that at about 8:00 A.M. he was on West 74th Street between Amsterdam Avenue and Broadway when he observed a parked 1969 Continental bearing Rhode Island plates; that the car was empty and the fact that attracted him to the car was the Rhode Island Plates which Officer Kollmann knew from his experience, were very easy to obtain as all that one needed to register a motor vehicle in Rhode Island at that time was a bill of sale (H.9); that he went up to the car and copied down its vehicle identification number, which in that model car was located on the dashboard on front of the driver's seat and was visible from the outside (H.10);that this vehicle identification

number,# 9Y82A873470 (H.19) was checked by phone with the National Crime Information Center (NCIC) by Officer Kollmann at the time and he was informed that the described car with the aforementioned vehicle identification number had been reported stolen in Boston Massachusetts (H.10).* Detective Kollmann further testified that after he received this report that he waited at the scene from 9:00 to 11:50 A.M. and at 11:50 A.M. he observed three men enter the Continental, drive off and make a left turn going northbound on Amsterdam Avenue (H.12);that he and his team followed in the police car and pulled up behind the Continental when it stopped at the nearby traffic light and they arrested the three occupants because they were in a reportedly stolen vehicle (H.12);that the occupants were ordered out of the car, told to put their hands against the car and they were frisked; that at that time their rights were read to them and they were put in the police car and were driven to the 20th Precinct (H.13, H.41) and that Detective Smith drove the Continental to the said precinct alone. Detective Kollmann, while referring to his records, named the occupants of the car as Kenneth Leroy Brown who was the driver and Jerome Richardson** and James Brown who were the

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* Gov'ts Ex.1 is a report from the Boston Police Dept.,mailed on May 15,1973,stating that a car bearing Id. No.9Y82A873470 was reported stolen from one Vincent H.Jorden in Boston, Mass. and that at the time it was stolen in bore Mass. Plate G24047(H.17-20,H.49).

** Co-defendant VINCENT BROWN stated on direct examination that prior to his decision to cooperate he used the name Kenneth Brown (H.243) and Sp. Agent Gallo testified that when he first interviewed appellant GEORGE NICHOLAS, that Nicholas gave the name, Jerome Richardson (H.79).

passengers; he could not identify any of the parties in Court however (H.14) and he testified that the driver of the car said that the car belonged to his sister who was in Rhode Island (H.30). On cross-examination Detective Kollman testified that at the time of the arrest a registration was produced showing that the car was registered to one Winifred Davis of Providence, Rhode Island, and that the vehicle identification number set forth in the registration was #9482A873470 (H.26)*. Detective Kollmann further testified that the police car and the Continental driven by Detective Smith arrived at the 20th Precinct Stationhouse at about the same time;that Detectives Santoli and Smith took the prisoners into the stationhouse and he remained outside with the Continental and moved it into the police parking lot to inventory the contents of the reportedly stolen car in accordance with standard police procedure as set forth in The Patrol Guide, Sec. 113, N.Y.C.P.D. (H.13-15) and that during the inventory search he found a closed shaving kit that was on the floor of the car by the front passenger's seat, opened it and discovered fifty twenty dollar bills which he recognized as being counterfeit because they had the same serial number (H.15,H.16) and he then called the Secret Service and Agent Joe Gallo responded that night to the 20th Precinct (H.16).Detective Kollmann insisted that at the

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* This registration and the letter of transmittal from the Rhode Island authorities were admitted in evidence as Gov't Exhibits 2,3 and 4 (H.51,H.52).

time of the arrest that neither the vehicle nor its occupants were searched and that nothing was taken from the vehicle at that time (H.24); he admitted that at no time did he apply for or obtain a search warrant (H.29) and that he had no reason to believe that a dangerous object was in the closed shaving kit (H.55).Detective Kollmann further testified that the following day the occupants of the car were taken to the New York City Criminal Court and arraigned on the state charges and at that time they were turned over to Agent Gallo who had arrived at the court with two Federal Warrants(H.16).

Detective Patrick Santoli, one of the partners of Detective Kollmann at the time of the arrest testified at the conclusion of the hearings (H.337 et seq.). His testimony as to the facts of the arrest were similar to the testimony of Detective Kollmann. Detective Santoli testified that no search of the vehicle was made at the scene of the arrest (H.340);that he and Detective Kollmann drove the three prisoners to the 20th Precinct Station-House in the police car (H.339,H.366);that the first time that he saw the shaving kit and the counterfeit money when he was on front of the booking desk with the three prisoners giving the desk officer information when Detective Kollmann came in with the kit containing the money and he mentioned the similarity of numbers; that at that time the Secret Service was called (H.340, H.365) and that night, he, Santoli, discussed the case briefly with Agent Gallo (H.342,H.359,H.370,H.371); that Agent Gallo

spoke primarily with his partner, Detective Kollmann; that he, Santoli, never discussed the case with Assistant United States Attorney Nicholas Figueroa (H.342,H.360) and that most of his testimony is not based on actual recollection but on usual procedures (H.356).

Joseph L. Gallo, a Special Agent with the United States Secret Service, testified as follows: That on May 1, 1973, he was working with the Counterfeit Squad of the New York Field Office and on that date his office received a call from the New York City Police Dept. about an arrest of persons in possession of counterfeit money and he and Sp. Agent Bolan went to the 20th Precinct Station House (H.78);that he interviewed the appellant George Nicholas, who at that time gave him the name, Jerome Richardson (H.79) and Sp. Agent Bolan interviewed the other two prisoners (H.80); that after advising appellant of his rights from an advice of rights form which was marked Gov't. Ex.6 in evidence (H.80,H.81) and receiving an affirmative answer from appellant as to his willingness to answer questions, the appellant told him that Jerome Richardson was not his real name but that his true name was George Nicholas, that on April 30th, appellant and the co-defendant Vincent Brown came to New York City from Providence Rhode Island, that before leaving Providence they went to an individual named Moe, from whom Brown received counterfeit money on consignment and that they then left for

New York City (H.81); that appellant asked Agent Gallo if the Federal prosecution against him would be dropped against him if he cooperated, to use Agent Gallo's language,appellant " was coming on strong about promises that there would not be prosecution, et cetera." (H.91) and appellant was told by Agent Gallo, that if he cooperated, that Gallo felt that the United States Attorney would take that into consideration (H.90,H.91); that after this conversation with appellant he had a conversation with the Assistant United States Attorney and subsequently obtained two warrants and the next day , May 2, 1973, these warrants were executed in the Criminal Court in Manhattan and the two defendants were taken into custody; that there was insufficient evidence to hold the third occupant of the car, one James Brown; that after the two warrants were executed, the two defendants were taken to the New York Field office, advised of their rights and were asked if they were willing to answer any questions (H.82); that he, Agent Gallo, questioned the co-defendant,Vincent Brown, and Agent Travaglino questioned the appellant seperately, initially,then the two defendants and the respective agents were together for a short period (H.86); that at first the co-defendant Vincent Brown denied knowledge about the particular counterfeit but later on he stated that immediately prior to coming to New York City from Providence, Rhode Island on April 30th,1973, that he and appellant had heard that an

individual in Providence was dealing in counterfeit money and that they did in fact purchase one thousand dollars worth of counterfeit money for two hundred dollars, one hundred dollars in cash and one hundred dollars on consignment (H.83,H.84); that after leaving the New York Field Office on May 2, 1973, the two prisoners were taken to the office of Assistant United States Attorney Nicholas Figueroa at the United States Courthouse for arraignment purposes and also because Agent Gallo was trying to get the two defendants to work with the Government (H.92); that after this meeting with the Assistant United States Attorney, the two defendants were arraigned before the United States Magistrate, released on Personal Recognizance Bonds, taken to the New York Field Office of the Secret Service and from there they were taken to John F. Kennedy Airport where they were released to fly at government expense to Providence, Rhode Island where they did in fact cooperate with the Government (H.92-95).Agent Gallo further testified that neither he nor Assistant United States Attorney Nicholas Figueroa, in his hearing, ever told the defendants that they would not be indicted for the offenses that they had allegedly committed (H.105).

Louis Travaglino testified that on May 2, 1973 he was a Special Agent with the U.S. Secret Service assigned to the Counterfeit Squad in New York (H.60) and on that day, shortly after 12.05 P.M. he had occasion to interrogate the appellant at the New York Field Office at 90 Church Street, New York, N.Y.

(H.60,H.65);that prior to the interrogation he informed appellant of his Miranda Rights and the fact that he was being questioned with regard to his possession of counterfeit currency; that he read to appellant his rights from an Advice of Rights Form,which was admitted in evidence as Gov't Ex.5 (H.61,H.62) but that appellant refused to sign it and Agent Travaglino made notation of this fact on the form (H.63,H.64); that appellant stated that he had been in Providence, Rhode Island with the co-defendant,that they had purchased a quantity of counterfeit United States Currency and he identified the source and agreed to cooperate with the Government (H.64-74). Agent Travaglino also testified that Agent Gallo was questioning the co-defendant seperately, at the same time, and that at the conclusion of the questioning, both defendants were brought together in the presence of the agents (H.66).

Nicholas Figueroa testified that from 1972 to 1975 he was an Assistant United States Attorney in the Southern District of New York and that he was in charge of this case while he was in that office (H.154). Figueroa claimed no distinct recollection of the facts and his testimony was based upon what he called usual procedure (H.158). Figueroa testified that he met both defendants on May 2, 1973 at about the time that they were to be arraigned before the United States Magistrate on counterfeiting charges; that they had been stopped by N.Y.C. Police who stopped their car, had seen counterfeit money on the floor and had arrested

them (H.155,H.181)-this recollection was butressed by Nicholas' Ex. A id (H.181) later marked in evidence (H.362) which is a draft of the complaint in this action, admittedly in Figueroa's handwriting made on May 2, 1973 and attesting to the foregoing facts of the arrest and naming Patrolman Patrick Santoli of the N.Y.C. Police Dept. as the source of this information (H.181). Figueroa testified that he probably interviewed the defendants in his office prior to their appearance before the United States Magistrate, that pedigree statements were taken,advice of rights given and that they were advised that if they wished, they could make statements concerning the accusations; that he believes that both defendants expressed an inclination to cooperate and to make statements and that he told them that the Government would be interested in any cooperation (H.156,H.157). Figueroa further testified that it was the policy of the United States Attorney's Office at that time not to make any commitments to cooperating individuals other than that should they be indicted, their cooperation would be expressed to the sentencing judge and that he probably said something to that effect to defendants (H.158); that he is pretty sure that he never told defendants that they would not be indicted for this offense (H.158,H.159), nor did he tell either defendant or their attorneys that the prosecution would be dropped or that defendants would not be indicted, and that he never authorized any agents to offer immunity (H.161,H.166); that during the years that he was an Assistant United States

Attorney he only offered immunity two times and that on one of these times it was rejected by his superiors (H.166).

John Curley, the former attorney for co-defendant Vincent Brown was called as a Government witness and testified regarding complaints by said co-defendant during the months of June and August 1974, to the effect that he should not have been indicted and that his indictment was a mistake (H.189-191); that these complaints culminated in a meeting between Curley, the co-defendant and Assistant United States Attorney Figueroa on or about August 12, 1974, at which time the co-defendant was told by Figueroa that he was mistaken but that his cooperation with the Government would be brought to the attention of the sentencing judge (H.192). Curley also complained of the irregular handling of this case by the United States Attorney's Office, that his office was not informed when his client was scheduled to make Court appearances and did not receive the usual notice with regard to other developments in the case (H.197-199).

Appellant Nicholas' Case On The Hearing

The Appellant George Nicholas testified as follows: that he was arrested on May 1, 1973, while he was a passenger in a car after it had pulled away from the hotel and it was stopped for a red light about a block and a half away; that there were three people in the car; that when the car stopped, three police officers approached the car with guns drawn, ordered the occupants out of the car and searched them and the interior of the car

in the street at the time of the arrest; that during the search of the car he observed the police find the kit and open it (H.112-114,H.286);that during this initial search at the scene appellant was not informed why he was being arrested nor did he receive his Miranda Warnings and he assumed that he was being taken into custody because of the money that had been found in the car (H.115); that from the scene of the arrest, appellant and the other two individuals were driven to the police station and one of the officers drove the car that they had been riding in to the same destination (H.115,H.116); that he may have been informed of his Miranda Rights at the police station, however at that time appellant was more interested in talking to the officers than being interrogated by them (H.116); that on the night of his arrest he was interviewed by the Secret Service and at that time he had an understanding with them that anything that he would say to them would not be used against them in any proceeding and that he would not be prosecuted if he furnished the cooperation that they requested (H.116,H.127,H.128);that the first time that appellant learned that his arrest on May 1, 1973 had to do with a stolen car was the following day, May 2, 1973 when he appeared in the State Court (H.116,H.129,H.133) at which time he and the codefendant Vincent Brown were turned over to the custody of the Secret Service Agents (H.118); that he believes that on May 2nd he was interviewed by Agent Gallo: that initially he and the co-defendant were interviewed seperately, then later they were

interviewed together (H.123); that he also spoke to Agent Gallo's partner that day; that he remembers being shown the Advice of Rights Form (previously admitted in evidence as Gov't Ex. 5 during the testimony of Agent Travaglino) and at that time he stated that whatever he had to say was strictly confidential between them so that they would understand the proposition that was being made about confiscating the plates* and that nothing being said would be used against appellant or his co-defendant (H.122, H.128);that as a result of these interviews and conversations, later that day (May 2, 1973), the defendants together with the Secret Service Agents had a conference with Assistant United States Attorney Nicholas Figueroa and they were offered that in exchange for their cooperation as hereinbefore mentioned, that they would receive immunity from prosecution on the present charges (H.124,H.136,H.138);that after this conference the defendants appeared before the United States Magistrate and with the consent of the Government they were released on personal recognizance bonds; that from Court they left with the Secret Service Agents and taken to John F. Kennedy Airport and flew back to Providence, Rhode Island, with the Government paying the air fare.

Co-Defendant Brown's Case On The Hearing

Winifred Davis,the sister of the co-defendant Vincent Brown

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* Appellant testified that later on the Government settled for confiscation of a large quantity of counterfeit money instead of the plates (H.145-146)

(H.214) testified as follows: that on April 9, 1973, she purchased a green and black Lincoln Continental; the bill of sale that she received on the purchase was admitted in evidence as Brown's Ex. A (H.217); she identified Gov't Ex. 3, which was admitted in evidence during the testimony of Detective Kollmann (H.51, H.52) as a copy of her registration for that vehicle; that she never reported the car as being stolen; that there came a time that she allowed her brother, the co-defendant Vincent Brown, to use the car (H.214, H.215) and she was informed later by her sister in law, Brown's wife, that the car was being held by the New York City Police (H.218, H.226); that she called the police and they informed her that they stopped the car because they received a report that there were guns in the car and that the car was stolen (H.219, H.227) and although she sent to the N.Y.C. Police Dept. an affidavit and a copy of the bill of sale for the car, the car was never returned to her.

James Brown, a friend of the co-defendant Vincent Brown (H.280) testified as follows: that he was the third person in the car with the two defendants on May 1, 1973; that he was with them when the car was stopped by the police; that the police officers stopped the car, approached it with drawn guns, ordered its occupants out into the street and lined them up against the car, searched them and the car (H.275, H.276, H.284); that at this time, he saw one of the officers take a little bag out of the car

(H.277);that when he asked the police what was the matter he received no answer (H.276); that he was then taken to the police station in the car that he had been riding in and that the car was driven by a police officer; that the two others were taken to the police station in the police car (H.276); that in the yard outside of the police station, the officers went through the bag and came out with a lot of money (H.277,H.279); that he was questioned by the Federal Authorities at the police station but was not charged by them with any crime (H.279) and the first time that he heard anything about the car being stolen was when he went to court (H.279).

The co-defendant Vincent Brown testified as follows: that on May 1, 1973, he was stopped in a motor vehicle after he had turned left on Amsterdam Avenue from 74th Street; that a police officer came up from behind with a drawn gun on the driver's side, put the gun to the window, ordered Brown to turn off the ignition and to come out of the car with his hands raised; that two other officers came up on the other side; that all of the occupants were ordered out of the car and the car was searched (H236,H,239,H.259); that in answer to his inquiry, the police said that they had been informed that there were guns in the car and that they were looking for them; that he saw one of the officers on the passenger's side open the glove compartment of the car and look under the front seat while another officer in the back looked through the car; that he and the other occupants were searched but that no guns were found (H.236

H.259); that after the glove compartment had been searched and its contents dumped on the front seat, one of the officers, whom Brown identified as Detective Kollmann, asked to see his license and registration; that Brown picked up the car registration which had been dumped out of the glove compartment and was on the front seat and he took a license out of his wallet, which license belonged to his brother Kenneth Brown, and he gave them to the officer (H.238); that he was then told that they (the occupants of the car) would be taken to the precinct for further investigation; that the car that Brown had driven, was driven to the police station by one of the officers accompanied by either the appellant or James Brown and that he rode down to the precinct in the police car with the remaining occupant of his car;that when they arrived at the station house, two officers took Brown and the others inside; that shortly afterward the officers went outside and returned with a cosmetic bag and with certain items of Brown's clothing that had been in the back seat and trunk of the car (H.239,H.256) and they walked over to the prisoners and asked them what they were doing with all of the money that was in the cosmetic bag; later Brown and the others were told by the officers that the money was counterfeit and they were put in the bull pen; shortly afterward, he heard appellant ask to go to a private bathroon and when appellant left, that was the last time that Brown saw the appellant that night and the next time that he saw the appellant was the next morning when they were taken to the state court for arraignment, that it was about this time that

Brown was told that one of the reasons why he was being arrested was because the car had been stolen (H.240,H.241);that the next day he and the appellant were turned over to the Federal Authorities at the state court and he believes that Agent Gallo was one of the persons that he was turned over to (H.242);that Agent Gallo questioned him that day (May 2nd) and at first he would not cooperate, however after appellant was brought in with another Federal Officer and after appellant told him in the presence of the Secret Service Agents that there was a deal that in exchange for the plates there would be no prosecution (H.243,H.261,H.266), Brown agreed to cooperate;that at the time, Agent Gallo confirmed appellant's statement and took Brown and appellant to the office of Assistant United States Attorney Figueroa who confirmed the agreement and as a result Brown cooperated fully with the authorities (H.244-247,H.264,H.268,H.274); that he would not have cooperated with the authorities or have given them any statements if he did not believe that he had an agreement and would not be prosecuted (H.247,H.258); that he believed that the case was over but later learned that an indictment had been filed against him (H.248) and when Brown came to the office of the Assistant United States Attorney Figueroa to complain, he was told that answering the indictment was just a formality and the meeting ended in an argument (H.249).

The motions were all denied; to wit-suppression of statements because of failure to give Miranda Warnings (11a,H.288); suppression of physical evidence (counterfeit bills) because of unlawful search and seizure (20a,H.379); dismissal because of the failure of the Government to comply with the Speedy Trial Act (25a,H.384) and for dismissal of the indictment because of de facto immunity based on promises by representatives of the Government (32a-43a,H.413-H.424).

THE ARGUMENT

Point 1

APPELLANT WAS GRANTED DE FACTO IMMUNITY IN EXCHANGE FOR COOPERATION ACTUALLY FURNISHED AND THEREFORE HIS MOTION FOR DISMISSAL OF THE INDICTMENT ON THAT GROUND SHOULD HAVE BEEN GRANTED OR AT THE VERY LEAST ALL STATEMENTS MADE IN FURTHERANCE OF OR LEADING UP TO SAID AGREEMENT SHOULD HAVE BEEN ORDERED SUPPRESSED.

Despite the fact that appellant moved in his supplemental notice of motion dated September 8, 1977, for dismissal of the indictment pursuant to FRCP Rule 12 (b) based on promises by representatives of the Government not to prosecute in exchange for cooperation that was subsequently furnished in reliance on that promise [de facto immunity] (R.23), Judge Stewart in a preliminary determination stated that he would consider this motion only in the context of suppression of statements and that in no event would he consider said motion and the evidence submitted in

support thereof with a view toward dismissing the indictment (26a, H.385). This determination was made after the main suppression of physical evidence motion, based on an illegal search and seizure had been denied (20a,H.379). Subsequently Judge Stewart denied this motion finding that no commitments had been made by the Government or its agents, that no deliberate effort was made to mislead defendants, and that subsequently the Government had met its burden of proof (43a,H.424).

It is submitted that Judge Stewart, in his preliminary determination foreclosing the possibility of consideration of dismissal of the indictment based on the evidence presented concerning the promise, was in error and that this error vitiated his final determination on this portion of the motions.

There is no question that the evidence of the defendants, if believed, that there was a quid pro quo-cooperation that was furnished by defendants with tangible results to the benefit of the Government based on and in reliance of a promise of immunity by representatives of the Government, which promise was not kept-would entitle the defendants to an order of dismissal of the indictment based on the aforementioned motion. To the effect that such promise is specifically enforceable against the Government-see United States v. DeSena, 490 F.2d 692,694 (USCA 2d. Nov.1973) and United States v. Carter, 454 F.2d 426 (USCA 4th 1972).

In United States v. Paiva, 294 F. Supp. 742 (USDC. Dist of Col.

1969) a case in point, the Court stated at page 747, as follows:

> "[6-8] All that is held here is that if, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid those arrangements by using the courts, its decision so to do will come under scrutiny. If it further appears that the defendant, to his prejudice, performed his part of the agreement while the Government did not, the indictment may be dismissed. * *"

See also Santobello v. New York, 404 U.S. 257.

It is interesting to note that on sentence appellant received a term of three years imprisonment, which is one year longer than the sentence imposed on the target of the investigation, one "Moe" who was the source of the counterfeit money in Providence, Rhode Island,* and who was arrested as a result of defendants' cooperation.

Certainly the terms used by Agent Gallo that if the defendants cooperated "that the information he gave me would be brought to the attention of the Assistant United States Attorney" (H.91) and by Assistant United States Attorney Nicholas Figueroa, "that should they be indicted a good word would be put in for them, or, rather, the nature of their cooperation would be expressed to the sentencing judge." (H.158) were empty phrases which by their very nature and under the circumstances were meant to mislead the distraught prisoners into believing that they were promised something when in fact the words meant nothing. One thing is certain however, and

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* It appears in appellant's probation report that one Moe Holder, who was arrested as a result of defendants' cooperation received a sentence of two years imprisonment for counterfeiting imposed in the United States District Court in Rhode Island.

that is the actions of the governmental representatives within an hour after the promise or representation was given. At their behest the defendants were released from custody on personal recognizance bonds and were taken to Kennedy Airport to be flown to Providence , Rhode Island at the expense of the Government. Considering the fact that both of the defendants, although they were streetwise, had no legal training as to legal phraseology of contracts, that they were dealing with trained agents of the Government who specialize in the nuances of words, from the fact that it was admitted that from the beginning appellant "came on strong about promises that there would be no prosecution" (H.91) and the belief later on that the charges had been dropped, it is submitted that either that the promise of no prosecution by the representatives of the Government had been broken by them or that they deliberately mislead appellant and the co-defendant to their detriment and that findings to the contrary are neither based on the evidence or on the law.

As to the alternate position,that at the very least,that all statements made in furtherance of or leading up to said agreement, should have been suppressed,the Court is referred to Point 3 herein.

Point 2

THE PHYSICAL EVIDENCE SOUGHT TO BE SUPPRESSED, THE FIFTY COUNTERFEIT FEDERAL RESERVE NOTES, WERE THE FRUITS OF AN ILLEGAL SEARCH AND SEIZURE AND THEREFORE ERROR WAS COMMITTED WHEN THE DISTRICT COURT, AFTER A HEARING, DENIED THE MOTION TO SUPPRESS SAID PHYSICAL EVIDENCE.

The testimony with regard to the seizure of the physical evidence was given by Government witnesses Detectives Francis Kollmann and Patrick Santoli and by the defense witnesses, appellant George Nicholas, the co-defendant Vincent Brown, and by James Brown, the other occupant of the Continental at the time of the arrest. This testimony is summarized earlier in this brief.

Regardless of whether the contraband, which was ccunterfeit money contained in a closed shaving kit found on the floor of the Continental by the officers, was found at the time of the arrest, as testified to by appellant and the witness James Brown, or at the time of the alleged inventory search, as testified to by Detectives Kollmann and Santoli, it is submitted that the fruits of the search of the closed shaving kit should have been suppressed under the authority of United States v. Chadwick, _____U.S. _____, 53 L.Ed 2d/538, 97 S.Ct.2476(decided June 21,1977), a case directly in point, where a suppression order was sustained with regard to the contents of a locked footlocker found in the trunk of a car in which the defendants had been arrested,but which footlocker was not searched or inspected until approximately an hour later at the impound area of the Federal Building without the benefit of a search warrant. After stressing the proposition that the Fourth Amendment is intended to protect individuals and not only dwellings and other specified locations, Chief Justice Burger writing the opinion of the Court, stated at 97 S.Ct,page 2485 as follows:

" Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody;the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency.Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority.Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate,before their privacy interests in the contents of the footlocker were invaded.

Accordingly, the judgment is

Affirmed."

In the District Court the Government argued and Judge Stewart found that the counterfeit money was discovered as the result of a proper non criminal inventory search.* Judge Stewart based this decision on South Dakota v. Opperman , 428 U.S. 364,49 L.Ed.2d 1000, 96 S.Ct.3092, referred to in United States v. Chadwick, supra.**

In South Dakota v. Opperman , supra, the respondent's unoccupied car was observed on December 10, 1973, between the hours of 2:00 A.M. and 6:00 A.M. illegally parked and was given a citation for that offense at 3:00 A.M.At 10:00 A.M. the vehicle was seen still to be in the same place and was given a second citation and the police headquarters was routinely notified and the car was taken to

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* As an alternative finding Judge Stewart found the search to be incidental to a lawful arrest and denied suppression of the physical evidence.This finding is mutually exclusive in theory from the non-criminal inventory search-See South Dakota v. Opperman supra,Fn 8.

** See United States v. Chadwick,supra, Fn 5 excluding non criminal inventory searches from ambit of its decision and referring to South Dakota v. Opperman ,supra.

the city impound lot where from the outside of the car the officer observed a watch and other personal property of respondent in the car. Using the standard type of inventory form and according to usual police procedure in such a situation, the officer searched the car for the purpose of inventorying the contents of the car, including the glove compartment which was unlocked and in which he found a plastic bag containing marihuana. A motion to suppress evidence in the State court on a charge of possession of marihuana was denied and respondent / was convicted but his conviction was reversed by the Supreme Court of South Dakota on the ground that the evidence was obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures. In the opinion of the Supreme Court of the United States reversing and remanding, Chief Justice Burger * set forth the reasons for justifying an inventory search at 428 U.S. 369 as follows:

> " When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: The protection of the owner's property while it remains in police custody, United States v. Mitchell, 458 F.2d 960, 961 (CA9 1972); the protection of the police against claims or disputes over lost or stolen property, United States v. Keleher, 470 F.2d 176, 178 (CA5 1972); and the protection of the police from potential danger, Cooper v. California,

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* It is noteworthy to observe that in this opinion Chief Justice Burger adopted the concept apparently abandoned by him in United States v. Chadwick, supra that in this type of case the automobile is to be considered the container of all of the personal property found in it-see page 371.

386 U.S..,at 61-62.The practice has been viewed as essential to respond to incidents of theft or vandalism. See Cabbler v. Commonwealth,212 Va 520,184 S.E.2d 781, 782 (1971),cert. denied,405 U.S. 73; Warrix v. State, 50 Wis.2d 368,376,184 N.W.2d 189, 94 (1971).In addition police frequently attempt to determine whether a vehicle has been stolen and thereafter abandoned . * *"

In People v. Counterman, 556 P.2d 481 (Supreme Court of Colorado en Banc,Nov. 1976) a case presaging Chadwick, which involved an affirmance of an **order** granting a motion to suppress evidence seized from a station wagon that was stopped for speeding, where the search took place after the arrest of the occupant who the police ascertained was wanted on a felony charge and the impounding of the station wagon, where the contraband (cocaine) was subsequently discovered in a closed knapsack, South Dakota v. Opperman, supra, was distinguished and found not applicable by the Supreme Court of Colorado, which stated at page 485, as follows:

" * * * While the knapsack was itself in plain view, its contents were securely sealed and completely unknown to the officer.The knapsack did not give any indication that its contents were dangerous or particularly valuable and in need of **a special** inventory.The legitimate purposes of the inventory search could have been fully accomplished by merely noting the item as a sealed knapsack. The defendant could have been offered the choice of a full inventory of the contents at the police station. * *"

To the same effect and with a similar factual basis to the case at bar-see People v. Grana, 527 P.2d 543 (Supreme Court of Colorado en Banc, May 1974) which involved the search of a zippered compartment of a closed flight bag found in the trunk of a car.

It is submitted that the case at bar is distinguishable from

South Dakota v. Opperman, supra, in that the impounding of the car in Opperman was strictly a civil procedure without even the pretense of a criminal investigation, while the seizure of the Continental in the present case was part and parcel of a felony arrest. In Opperman where valuables were in full view, it could be claimed that the procedure was intended to protect the owners property, while in the present case the contraband was concealed from view in a closed shaving kit.Also in the present case, it was claimed that the seized Continental had been reported stolen in Massachusetts one month previously and therefore there was adequate time to dispose of the owners property and no property to protect as was evidenced by the alleged change of license plates-see page 6 of this brief. In Opperman the defendant was not readily available,thus the inventory search, while in the present case the defendants were in custody in the police station adjourning the parking lot to which the car was taken for the purposes of the search. Furthermore, as there was no fear of danger or other exigent circumstances, if the search was bona fide for purposes of inventory, the police could have inventoried the shaving kit as a closed shaving kit, as was suggested in People v. Counterman, supra.

It is therefore submitted that based on the aforementioned line of cited cases, that no matter whose testimony is accepted, that the motion to suppress the physical evidence should have been granted.

Point 3

VARIOUS STATEMENTS GIVEN BY APPELLANT TO FEDERAL LAW ENFORCEMENT OFFICIALS SHOULD HAVE BEEN SUPPRESSED AS HAVING BEEN OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Early in the suppression hearings, during the cross-examination of Agent Gallo, in response to several questions that appellant was permitted to ask the witness, it was brought out that there had been a conversation between Agent Gallo and appellant,at about the first time they met, about the appellant cooperating with the Government and furnishing information in aid of the investigation to find the source of the counterfeit and to eliminate it and that appellant "came on strong about promises that there would be no prosecution, et cetera." (H.89-91). Later on, in response to the statement by Judge Stewart, that any resolution of the appellant's motion to suppress statements would not consider the issues concerning said promises, whether they were made or broken by the Government (H.111), appellant's counsel stated that it was his position that said issues were within the scope of the hearing on said motion (H.110,H.111).See original notice of motion and affidavit in support thereof (R.14) wherein it is alleged that appellant was not told by the agents that "Anything that I say can be used against me in a court of law, or in any other proceeding" (see page 4 of affidavit in support of motion).

Immediately thereafter, appellant took the stand and testified. Appellant gave testimony concerning the alleged promise of cooperation which included the agreement by the governmental officials involved,

that such cooperation, including the conversations leading up to it, were to be strictly confidential and that they would not be used against appellant and the co-defendant. See page 16 of this brief.

It was after appellant's testimony on the hearing was concluded and decision reserved on appellant's motion to suppress (H.148), that Judge Stewart suggested that defendants file additional written motions with regard to the alleged promises made by the representatives of the Government (H.148,H.149).Appellant duly served and filed such supplemental motion.(R.23).

It is quite apparent that independent of Point 1 of this brief, that from the evidence,appellant either had an understanding with the representatives of the Government that any statements given or cooperation given would not be used against himself or his co-defendant in any proceeding, or at worst, he was not adequately advised of or did not understand the second Miranda Warning "that anything he says can be used against him in a court of law"-see Miranda v. Arizona, 384 U.S. 436,478-and therefore the District Court was in error in denying appellant's motion to suppress statements given by him to representatives of the Government.

Point 4

APPELLANT'S MOTION FOR DISMISSAL OF THE INDICTMENT BECAUSE OF DENIAL OF HIS RIGHT TO A SPEEDY TRIAL SHOULD HAVE BEEN GRANTED.

As appears from the Docket Entries, the indictment in this proceeding was filed on July 25, 1973. After prolonged reference to the court files (H.292-296,H.298,H.311-317) during the course of the hearings, an oral application was made on behalf of appellant for dismissal of the indictment because of failure on the part of the Government to comply with the Speedy Trial Act, 18 U.S.C. § 3161(c) and § 3162 (A)(2). See also Rules of the U.S. Courts, Plans For Achieving Prompt Disposition of Criminal Cases, Southern District Plan,Rule 6 (a)(1),p.166.13. This motion was denied (H.384).

From the record of the District Court which is part of the record on appeal it appears that appellant has been in continuous custody since May 23, 1977, the date of the commencement of the removal proceedings against him in the United States District Court for the District of Massachusetts, until the date of the commencement of these hearings which was September 6, 1977, or a period of 105 days.

It is to be noted that while the warrant of removal was executed on July 5, 1977 (R.15), that the United States Magistrate in a covering letter stated that this delay was due to the inexcusable administrative error of his office (R.11).

Under the aforementioned Speedy Trial Act as supplemented by the aforementioned rules of the United States District Court for the Southern District of New York, the trial of a defendant held in continuous custody shall commence within 90 days following

the beginning of continuous custody.

The relevant provisions of Title 18 of the United States Code imposing sanctions for non compliance with the Speedy Trial Act reads as follows:

"§ 3162 Sanctions

(a)(1)* * * * * *

(2)If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h),the information or indictment shall be dismissed on motion of the defendant.The defendant shall have the burden of proof of supporting said motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice,the court shall consider,among others,each of the following factors: the seriousness of the offense;the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section. * *"

In conjunction with this point the Court is asked to take into consideration the series of Speedy Trial cases such as Barker v. Wingo, 407 U.S. 514 setting forth the rules applicable to the determination of whether the Constitutional right to a speedy trial, as guaranteed under the Sixth Amendment has been violated and United States v. Marion, 404 U.S. 307, to the effect that where the delay causes substantial prejudice to accused's right to a fair trial, that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment.

Substantial prejudice to defendants occasioned by the delay in prosecution was evidenced by the failure of various witnesses produced by the Government and who are professional law enforcement officers or officials, to recollect actual facts and the practice of the Court to allow them to testify as to usual procedures, which testimony was heavily interspaced with the words, "probably", "should have" and "might have", as opposed to personal knowledge, to enable the Government to sustain its burden of proof. A notable example is the testimony of former Assistant United States Attorney Nicholas Figueroa (H.155,H.158,H.161,H.162,H.167,H.179,H.182). See also testimony of Detective Santoli who testified that most of his testimony was based on procedures (H.356).

That the Government bears responsibility for the delay in prosecution-see testimony of John Curley, Esq.,former attorney for co-defendant Vincent Brown as to irregular procedures followed by the Government in this case (page 14 of this brief).Also it appears that appellant's address was known to the Government in April 1974, as he signed an appearance bond in the United States District Court, District of Nevada, on this indictment (R.2,R.3) and a day or so before he was scheduled to appear in New York on this bond, the office of the United States Attorney was notified that appellant was out of funds (H.316,H.317),however n[illegible]ternate means to obtain appellant's appearance in this jurisdic[illegible]re used or attempted.

It is respectfully submitted that from the entire record of this proceeding, it is apparent that appellant was denied his right

to a speedy trial, that he suffered substantial prejudice as a result and that error was committed by the District Court in failing to grant the motion to dismiss the indictment pursuant to the Speedy Trial Act.

Point 5

UNDER THE CIRCUMSTANCES OF THIS CASE THE IMPOSITION OF A THREE YEAR TERM OF IMPRISONMENT WAS EXCESSIVE.

Reference to the entire record is submitted in support of this point and more particularly reference is made to page 23 of this brief and the footnote contained therein.

Conclusion

THE JUDGMENT APPEALED FROM SHOULD BE REVERSED AND THE MATTER SHOULD BE REMITTED TO THE DISTRICT COURT WITH DIRECTION THAT THE VARIOUS INTERMEDIATE MOTIONS SHOULD BE GRANTED AND THE INDICTMENT DISMISSED.

Dated: December 22nd, 1977

Respectfully submitted.

ALLEN S. STIM
Attorney for Appellant
George Nicholas

APPENDIX

CRIMINAL DOdocket
UNITED STATES DISTRICT COURT

U.S. Form No. 1 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U.S.:*
vs.	Nicholas Figueroa, AUSA
VINCENT BROWN a/k/a Richard Glover 9/20/74	
2 GEORGE NICHOLAS a/k/a Jerome Richardson	
	For Defendant: BROWN
	Legal Aid Society
	15 Park Row, NYC 10038 10th Fl
	Deft. Nicholas-- Joseph Stone
	277 Bdwy, NYC 10007

06) STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk					
J.S. 3 mailed	Marshal					
xVxcation 73-1482	Docket fee					
Title 18						
Sec. 472 & 2						
Possession of counterfeit oney.(Fed. reserve notes)						
(One Count)						

DATE	PROCEEDINGS
7-25-73	Filed indictment.
8-6-73	VINCENT BROWN - Deft. fails to appear. B/W ordered. Case assigned to Judge Stewart. WARD,J.
	GEORGE NICHOLAS - Deft. fails to appear. B/W ordered. WARD,J.
/22/74	Filed (George Nicholas) orig. papers & docket sheet from Las Vegas, Nevada: (1) petition for warrant of removal with waiver,etc. (2) order for warrant of removal (appearance bond to be forwarded)
-30-74	GEORGE NICHOLAS - Filed Order for an appearance bond 10% Deposit - Secured sum of $10,000 - $1,000 cash (U.S.D.C. District of Nevada) & letter fdwg $1,000 to S.D.N.Y.
-7-74	Filed GOVT. STATES READINESS FOR TRIAL.
-74	Filed the following documents received from Mag. Raby-- Docket Entry Sheet; Indictment Warrant, Disposition Sheet; Appointments of Counsel
-74	Bench Warrant Issued.

A

JUDGE STEWART

DATE	PROCEEDINGS
12-19-74	Pre-trial conference held. No date set for trial - STEWART,J.
Dec.26-74	VINCENT BROWN----Filed defts. affdt. and noticeof motion for an order to suppress certain physical evidence and any possible incriminatory statements,etc. ret. on : Jan. 10,1975 at 9:30am in Rm.1506.
03-11-75	VINCENT BROWN--Govts. application for Bench Warrant Granted. Stewart,
03-10-75	BOTH DEFTS.--Bench warrants issued.
06-10-75	BOTH DEFTS.--Filed the following papers recd. from Mag. Raby's office docket entry sheet,criminal complaint,SDNY, magistrate's warra of arrest,NY,disposition sheet, appt. of counsel(for deft. BRO Legal Aid and deft. RICHARDSON--Joseph Stone);and dismissal slip,re;deft. Browne.
3-18-76	VINCENT BROWN--Filed consent to transfer case for plea and sentence und Rule 20 to: U.S. District Court Providence, Rhode Island 02901 by certified mail #562664 return receitp requested. (filed mailed out on 4/22/76)
3-4-76	Filed letter acknowledging receipt of transferred file .
4-29-76	BROWN-- Filed return reciept requested card # 562664(green card)
4-27-76	BROWN--Filed certified mailed receipt # 562664(red receipt)
2-10-77	BROWN- Fld true copy of order with letter returning case from Providenc pursuant to Rule 40
2-10-77	BROWN - Case reopened
2-28-77	VINCENT BROWN- Bench warrant ordered. Bail $50,000 CAsh or surety..STew
2-28-77	B/W ISSUED
7-6-77	NICHOLAS ,GEORGE- Filed Mag. papers rec'd from U.S.D.C. District of Mass.
7-12-77	NICHOLAS GEORGE- Filed the following papers rec'd from Mag Raby- Mag #77-838 Docket entry sheet- Mag. final commitment- copy of indictment-complaint-notice of appearance of Allen S.Stim 132 Nassau St N.YC 10038- disposition sheet- cJA form #23 f affid.
7-11-77	George Nicholas- DEft pleads N/G (Allan S. Stim Counsel) Bail previously set by Mag. REvoked. Bail now set at $5,000 CAsh or surety. DEft remanded in lieu of bail. Motions filed by Aug. 1,1977 tRial set down for Sept. 12,1977....STEWART,J.
7-20-77	GEORGE NICHOLAS- Filed Remand
7-29-77	GEORGE NICHOLAS - Filed affid & notice of motion for an order pursuant to Rules 12 & of the Fed. Rules of Crim Proc. suppressing the use in evidence on the trial of th proceeding the following items as indicated. ret 8-12-77
7-29-77	G. NICHOLAS - Filed Mag. warrant of removal on Ind. from District of Mass.

B

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U.S. vs VINCENT BROWN & GEORGE NICHOLAS

73 731 2
Yr. Docket No. Def

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELA (a) (b) (c) (d)
8-2-77	GEORGE NICHOLAS- Filed Cja form #20 copy #5 appointing Allen Stim 132 Nassau St. N.Y.C. 10038 as atty for deft	
8-9-77	VINCENT BROWN- DEft (in custody) present W/ new atty Alton Wiley & AUSA Handel 25 South Argell St Providence R.I. 02906, 401-272-1000 Bail is reduced from $10,000 cash or surety to $5,000 cash or surety DEft contin remanded but is expected to make bail .....STEWART,J.	
8-10-77	Filed appearance bond in the amount of $5,000 dated 8-10-77 (VINCENT BROWN)	
8-11-77	Filed deft's request for production (V. Brown)	
8-11-77	Filed deft's motion for reduction of bail (V. Brown)	
8-12-77	Filed REMEND	
8-22-77	Filed Govt's affid in opposition of deft requests for production & to the motion for the suppression of evidence (V. Brown) & G. Nicholas)	
8-25-77	GEORGE NICHOLAS- Filed supplemental affid of deft	
9-9-77	GEORGE NICHOLAS- Filed Supplemental Notice of Motion & Affdvt. for an order dismissing the indictment because of defect in the institution of the prosecution, etc. Ret. Sept. 12, 1977 at 10:00 A.M. in Room 1106.	
9-9-77	GEORGE NICHOLAS- Filed Second Memo of Law in support of motion to suppress.	
9-9-77	VINCENT BROWN- Filed Affdvt. of Atty Alton W. Wiley.	
9-9-77	VINCENT BROWN- Filed Supplemental Or Amendement to Motion to Suppress filed by deft's former atty J.P. Curley.	
9-9-77	VINCENT BROWN- Filed Memo in support of his motion to suppress.	
9-20-77	Filed Govt's requests to charge	
9-20-77	Filed Govt's second supplemental memorandum in opposition to deft's motions to suppress	
9-21-77	Filed Govt's supplemental memorandum in opposition to deft's motions to suppress	
9-21-77	Filed petitioners supplemental motion to suppress evidence	
9-6-77	DEft Brown present W/atty Seton Wiley & deft Nicholas(in custody) present present W/ atty Allen Stoin & AUSA Handal. Suppression hearing begun & adj to 9-15-77 .....STEWART,J.	
9-15-77	Suppression hearing continued ....STEWART,J.	
9-19-77	" " " .....STEWART,J.	
9-20-77	Suppression hearing continued & concluded all motions to suppress are denied. Jury trial begun. During jury trial deft's Nicholas & Brown plead guilty to count 1 of the indictment. Plea accepted PSI ordered . Sentence date adj to 10-21-77 at 12 noon. Deft's Brown's bail of $5,000 cash or surety continued. DEft Nicholas Bail of $5,000 cash or surety is continued. DEft Nicholas continued remanded in lieu of bail.....STEWART,J.	
9-29-77	Filed affid & supplemental notice of motion for an order pursuant to the bail reform act asking that the bail be reduced . ret 10-21-77 (Brown)	

-continued-

AO 259A

Interval (per Section II) | Start Date / End Date | Lic | Total Cost/Days

C

DATE	PROCEEDINGS (continued) (Document No.)	V. EXC (a)	(b)
10-7-77	Filed ORDER On Sept 20,1977 deft;s Nicholas & Brown by their atty's made oral application to this Court for a reduction of bail - The Court denies their applications..So Ordered STEWART,J. M/N		
10-21-77	B/W ISSUED (BROWN)		
10-21-77	B/W ORDERED(BROWN)		
10-21-77	NICHOLAS (JEROME RICHARDSON) -- FILED JUDGMENT & COMMITMENT Deft (in custody) present W/atty Allen Stim & AUSA Ken Handal The deft is hereby committed to the custody of the Atty General or his authorized represenative for imprisonment for a period of THREE (3)YEARS on count 1. The deft is to,credited with time already served. DEft continued remanded,in lieu of $5,000 cash or surety/ bail but should the deft make bail at a later date ,he is to be released pending his appeal,should he decide to do so... .STEWART,J. ...Copies issued		
10-27-77	GEORGE NICHOLAS- Filed notice of appeal from the Judgment & order entered on the 10th day of Oct.1977. (notice to US Atty) (copy mailed to Allen Stim 132 Nassau St. (Suite212) NYC 10038 atty for deft		
11-2-77	GEORGE NICHOLAS - Filed commitment & entered return, Deft. delivered to WARDEN M.C.C., N.Y.C. on 10-21-77		
11-3-77	BROWN- Filed JUDGMENT & COMMITMENT - DEft (B/W vacated) present W/atty Alton Wiley & AUSA Ken Handal The deft is hereby committed to the custody of the Atty General or his authorizee representative for imprisonment for a period of THREE (3) YEARS on Count 1. The deft is continued on $5,000 cash/Surety bail pending appeal. .....STEWART,J. copies issued		
11-10-77	Filed Transcript of record of proceedings, dated 9/6/15, 19, 20 1977		

AO 256A

Interval (per Sect on II) | Start Date | End Date | C

D

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	INDICTMENT
-v-	:	73 Cr. 731
VINCENT BROWN, a/k/a Richard Glover, and GEORGE NICHOLAS, a/k/a Jerome Richardson,	:	
Defendants.	:	

The Grand Jury charges:

On or about the 1st day of May, 1973, in the Southern District of New York, VINCENT BROWN, a/k/a Richard Glover, and GEORGE NICHOLAS, a/k/a Jerome Richardson, the defendants, unlawfully, wilfully and knowingly and with intent to defraud, did keep in their possession and conceal certain falsely made, forged and counterfeited obligations and securities of the United States, to wit: Fifty (50) counterfeit twenty dollars ($20.00) Federal Reserve Notes bearing the serial number E 72 111 743 A.

(Title 18, United States Code, Section 472 and 2.)

PAUL J. CURRAN
United States Attorney

RULINGS BY THE COURT ON MOTIONS
DURING THE COURSE OF THE HEARINGS

mcbr

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

vs. : 73 Cr. 731

VINCENT BROWN, a/k/a RICHARD GLOVER, and GEORGE NICHOLAS, a/k/a JEROME RICHARDSON, :

Defendants. :

---------- x

Before:

HON. CHARLES E. STEWART,
District Judge

New York, New York

September 6, 1977
12:00 noon

APPEARANCES

ROBERT B. FISKE, JR., Esq.,
United States Attorney for the
Southern District of New York,
By: KEN HANDAL, Esq.,
Assistant United States Attorney

ALTON W. WILEY, Esq.,
Attorney for Defendant Brown

ALLEN STIM, Esq.,
Attorney for Defendant Nicholas

- - -

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ask for additional time to amend the motion to suppress and to submit the documents to the Court in support of that aspect of the suppression hearing.

THE COURT: I'm sorry, I didn't hear you. What aspect of it?

MR. WILEY: As to the question of whether or not there were any promises made in connection with the giving of these statements.

THE COURT: All right.

I would like to suggest this is what we do: As far as the papers which are now before me, I can consider that the motion has been made to suppress the counterfeit money because the seizure of that violated the Fourth Amendment, and also that a motion has been made to suppress any statements taken from Mr. Brown and Mr. Nicholas, because they were not properly given their rights, and therefore to that extent the confessions were not voluntarily obtained.

Now, as to those motions I'm going to reserve at this time. I would like counsel to submit briefs to me on those questions and I'd like those briefs to be in from each side by the end of this week, that is, by the end of the day on Friday.

I have only very, very tentative views at this point, but just to indicate the way I'm thinking so that

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you can prepare your briefs with that in mind, I think, very tentatively, that the Government has shown probable cause for the arrest. I think, although I wish to review the record on this, that the Government has shown that the proper warnings were given. I'm concerned, as I indicated earlier, about the effect of the Chadwick case on the seizure of the money and in particular to footnote 5 of the majority opinion. It seems to me that our problem is to a large extent involved with that footnote and I would like counsel to brief the Chadwick case and the Opperman case as modified or not modified by Chadwick. I know it is in your papers, Mr. Handal, the Opperman case. I would appreciate counsel paying particular attention to that footnote in that particular case and what it means to us.

Now, as to the other part of this hearing, we drifted off from time to time into the question of whether or not the promises were made by Mr. Figueroa or Mr. Gallo by the other Secret Service agents about what would happen to the defendants if they cooperated. We have some testimony, quite a bit of testimony on that issue. The Government may wish to put in more testimony. I think before we proceed with that issue any further, however, the defendants should file motions and I would like those motions filed no later than Thursday of this week with whatever supporting

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affidavits you wish.

We have the date fixed for trial on September 15th and any hearings that are required on what we will call the motion about the promises I'd like to hold and I could do it either Monday or Tuesday of next week. What suits counsel?

MR. WILEY: Monday would be better for me rather than Tuesday.

MR. STIM: Yes, Monday would be fine.

THE COURT: Mr. Handal?

MR. HANDAL: Yes.

THE COURT: I would plan to have any further hearings that are required at 11:30 on Monday, September 12.

We were going to have a separate motion formally filed. I take it that some of the testimony that we have taken this afternoon can be used on that motion. I take it that is understood. Is that right, counsel?

MR. WILEY: That would be agreeable?

THE COURT: Mr. Handal?

MR. HANDAL: Yes, your Honor.

THE COURT: Thursday file whatever additional motions you wish to and Friday I would like from all counsel their papers on the questions I have just been discussing on the original motions, and Monday, September 12 at 11:30,

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United States of America

v. 73 Cr. 731

George Nicholas and Vincent Brown

New York, New York
September 19, 1977

(Trial resumed.)

V I N C E N T B R O W N, resumed.

DIRECT EXAMINATION (CONTINUED)

BY MR. WILEY:

THE CLERK: Mr. Brown, may I remind you that you are still under oath.

THE WITNESS: Yes, ma'am.

Q Going back to the time you were taken into custody, did you have any articles of clothing in that vehicle when you were stopped by the New York City Police?

A Yes, I did.

Q What articles of clothing did you have in the car?

A I believe there were two suits, a shoe bag and a hat bag and some small underwear garments and so forth.

Q Do you know where they were physically located in the vehicle?

A In the trunk and parts in the back, somewhere in the back seat.

Q Did you have occasion to see the articles again

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MR. STIM: Defendant Nicholas rests.

DEFENDANT NICHOLAS: There are some things I would like to lay before the Court in regard to our case in this hearing.

THE COURT: In regard to what, Mr. Nicholas?

DEFENDANT NICHOLAS: Points of law in this hearing.

THE COURT: I think we have covered this thoroughly.

DEFENDANT NICHOLAS: Your Honor, did you notice on page 155 what Mr. Figueroa said?

THE COURT: I have see that.

DEFENDANT NICHOLAS: Thank you. Excuse me, is it possible that we can argue the points of our motion at this time?

THE COURT: Yes. I was about to come to that, Mr. Nicholas.

First of all, on the various motions I am satisfied that the police had reasonable cause to make the arrest, probable cause to make the arrest.

I am also satisfied that the Miranda warnings were given at the appropriate times. As to the search which led to the discovery of the counterfeit money, it seems to me it is clear under the Opperman case that if the search was at the police station, in the course of making an inventory,

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that the search was proper.

Now, if the search was made either at the time of arrest or en route to the police station or in the car, as the car was arriving at the police station, I am not entirely certain as to that. If that is the fact, and I have not decided in my own mind what the fact is as to when the satchel or kit was searched, but if it was prior to the time the car was examined at the station, I am interested in hearing what counsel believe the situation was.

I tend to think the search was still proper as incident to a lawful arrest. I will be happy to hear what counsel have to tell me about that.

Finally, as to the question of whether or not what we have been referring to as a deal, that is that there would be no prosecution if the defendants cooperated, I have not made up my mind either as to what the facts are.

I would suppose, however, that if in fact there was a deal made, that is, that there would be no prosecution, I would suppose the consequences would not be a dismissal of the indictment but rather just the suppression of any confessions or statements made.

Those are the two or three points that I have an open mind on. When was the search made, I don't think I need much argument on that. We have all heard the testimony.

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Prior to an inventory at the police station, that is the first.

Whatever you want to tell me what the proof shows as to the existence of a deal and am I correct that if there was a deal the result is suppression of the statement and not dismissal of the indictment?

Before I hear argument on that, I have another question I would like to raise, serious question. I have been going through the file and I can't find out for sure some of these things.

Mr. Wiley, under what circumstances and when was Mr. Brown taken into custody and brought to New York in connection with this year's activity in this matter?

MR. WILEY: The most recent time, your Honor?

THE COURT: Everything that has happened in 1977.

MR. WILEY: July 6th or 8th Mr. Brown was arrested in Rhode Island. There was a matter outstanding from Connecticut. A federal detainer was filed at that particular time.

After some hearings in Rhode Island, he was returned to New York and held here for a period of time because there was a $50,000 bail set which he was unable to make.

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I appeared before your Honor and your Honor reduced the bail to $5,000, which he did make at that particular time. Initially, he was arrested in the State of Rhode Island.

THE COURT: He was able to provide the $5,000 bail; is that correct?

MR. WILEY: That's correct.

THE COURT: That was very shortly after I reduced the bail?

MR. WILEY: That's correct.

THE COURT: Between his arrest in Rhode Island on July 8th and the time when I reduced his bail to $5,000, where was Mr. Brown?

MR. WILEY: Incarcerated partly in Rhode Island and partly in New York.

THE COURT: In federal custody all the time?

MR. WILEY: Not all of the time. Part of the time he was in federal custody.

THE COURT: Do you know the dates?

MR. WILEY: If you give me a moment.

THE COURT: I would like you to run that down for me. Where had Mr. Brown been prior to this year?

MR. WILEY: As far as I know, my contacts have been with him in Rhode Island. He has been in the State of

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Rhode Island. I have been contacting him through his parents. He has a residence in Rhode Island.

Are you talking about whether or not he has been incarcerated at all?

THE COURT: No. I just wondered whether he was available.

MR. WILEY: Yes. I would have to say he has been available.

THE COURT: What I am getting at is whether or not all the requirements of the Speedy Trial Rules of Southern District have been complied with.

Mr. Stim, as to Mr. Nicholas, I gather from the file that he was in Nevada in April of 1974 and was in custody in Nevada in April of 1974. Then he was supposed to be sent back to the Southern District at that time and the last I note from the file is that I find he was arrested in Massachusetts on May 23, 1977.

Do you know where he was in between?

MR. STIM: I believe he was in Las Vegas, most of the time, from what I have learned at various proceedings in this court. Mr. Nicholas, at the time he was in Las Vegas, I believe, his presence was known to the government at the time.

THE COURT: Was he in custody in Las Vegas?

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I believe the file indicates that while he was in federal custody in Nevada the bail was reduced from $50,000 to $10,000 personal recognizance bonds secured by $1,000 and he was then to be removed to the Southern District.

MR. STIM: He had put up $1,000 in cash.

THE COURT: He never turned up in the Southern District.

MR. STIM: was represented by an attorney, and I understand that they contacted the U.S. Attorney and Secret Service and there was a question about carfare and so forth, the expenses to come in. They weren't interested in bringing him in or something.

DEFENDANT NICHOLAS: I can explain that.

THE COURT: Not right at the moment. I want to indicate the kind of things I am interested in.

Then he was arrested, according to the file here, on May 23, 1977 somewhere in Massachusetts, Plymouth County?

MR. STIM: Yes.

THE COURT: There were some proceedings in the federal court in Boston as a result of which Mr. Nicholas eventually came to New York in early July, apparently about the same time as Mr. Brown did.

THE COURT: Mr. Nicholas, I gather, has been in custody since May 23rd of this year; is that correct?

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THE COURT

MR. STIM: That's correct. I don't know how much was federal and how much was state. It seems to me what I'm getting at is this. As to Mr. Brown, the record is not clear on this, but it at least suggests that the government knew where he was through a good part of this period, not all of the period.

As to Mr. Nicholas, I don't know where he was prior to May 23, 1977 and April of 1974, when he was in Nevada. I have no idea if the government knew where he was during that period of time.

Also, as to Mr. Nicholas, I would like to know, as precisely as I can, how long he was in state custody and when he began his federal custody of this year.

DEFENDANT NICHOLAS: Three months, your Honor.

THE COURT: I need to know precise dates.

Mr. Handal, perhaps you have considered all of these questions and perhaps you can throw some light on both of these problems. I suggest that we take a short recess at this point. Maybe we might adjourn for lunch at this point and I would like counsel to try to enlighten me as much as they can about the Speedy Trial problems which may or may not exist as to both Mr. Brown and Mr. Nicholas.

Perhaps you can use the time to prepare yourselves

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to argue the motions as to the portions which I have indicated that I would like to hear about.

I have here, Mr. Handal, the court file. Maybe you would like to see it.

Gentlemen, let's adjourn now until 1:45.

MR. WILEY: May Mr. Brown address the Court on one point?

THE COURT: All right, Mr. Brown.

DEFENDANT BROWN: In regard to our having the transcript and the proceedings, I don't have any of those. The Court has appointed counsel for them.

THE COURT: The transcript of what?

DEFENDANT BROWN: Of these proceedings.

MR. STIM: I have one.

THE COURT: Mr. Wiley, can you arrange to use Mr. Stim's copy?

MR. WILEY: I believe so.

MR. BROWN: I think it was said something about the bail set up. It wasn't said that the bail and finance was put together by immediate family and Mr. Wiley so I wouldn't have to be incarcerated.

I am indigent and I don't have the same proceedings.

THE COURT: Thank you, Mr. Brown.

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DEFENDANT BROWN: Thank you, your Honor.

THE COURT: We will resume at a quarter to two.

(Luncheon recess.)

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have been taken. These particular vouchers make no reference to the shaving kit or the alleged money.

THE COURT: All right, gentlemen. I am going to deny the motion to supress the counterfeit money for a number of reasons, not necessarily in the order of importance in which I will list them.

I note that this question of an unlawful search wasn't raised before the present series of proceedings, although that motion was made back in 1974. The testimony that we have taken in the last several days is in some respects conflicting. However, on the basis of the testimony of Officers Kullman, Santoli, Defendants Nicholas and Brown, I find that at the time of the arrest the three defendants were placed in the police car, the radio car, and driven down to the precinct by Officers Kullman and Santoli, and the Continental was driven by Officer Smith.

Mr. Nicholas, when he testified, confirmed this. He said that all three defendants went down to the station in the police car. In this connection also the testimony of Mr. Brown, both Mr. Browns, Mr. Vincent Brown and Mr. James Brown,was hardly clear as to who was in what car. That he didn't remember, but clearly who was in each car was contrasted with the testimony of the

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two police officers and Nicholas.

As to the counterfeit money, I find the money was discovered when an inventory search was made at the police station. That was Mr. Kullman's testimony, confirmed by Mr. Santoli,and Mr. Vincent Brown has testified that the first time he saw the money was when it was brought into the police station after the defendants had been taken to the police station.

Mr. Nicholas testified that he saw the money at the time of the scene of the arrest. This is inconsistent with Mr. James Brown's testimony that he saw the money in the parking lot when the car was pulling into the police station.

The vouchers, at the very least, they do indicate that an inventory search was conducted. I am not impressed by the lack of voucher or counterfeit money. It's not clear to me that the counterfeit money would be listed on the voucher since there was no reason to believe that it belonged to the owner of the car as contrasted with persons present in the car.

At any rate, the vouchers were evidentally prepared by Officer Kullman who wasn't cross-examined or examined by them in detail. It's possibly that a separate voucher may have been prepared for the counterfeit

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money. Where that voucher is, if it indeed exists or was prepared, we don't know.

On the basis of these findings, I concluded that there was a proper inventory search and in the course of that inventory search the counterfeit money was discovered.

I don't need to consider what would be the situation if we accept the testimony of the defendants, but if we do accept the testimony of the defendants, either that money was found at the scene of the arrest or en route to the police station, I think it's likely that I would find, and alternatively I do find that the search and seizure of the counterfeit money was proper as incident to a lawful arrest.

If one of the police officers was going to drive the Continental with one or more of the defendants with him, it would have been not unreasonable for him to have searched the toilet kit to discover whether there were weapons or other evidence in the kit that might be destroyed en route.

I think if you accept James Brown's story that the money was found in the parking lot before the car was impounded, that could be considered part of an inventory search.

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As I have indicated, I don't need to reach those possible factual situations since I found the facts were others.

MR. NICHOLAS: May I address the Court, please?

THE COURT: Wait until I am finished, Mr. Nicholas.

MR. NICHOLAS: Yes, sir, your Honor.

THE COURT: As to the complaint prepared by Mr. Gallo and approved by Mr. Figueroa, there is a statement in the complaint which I guess is the same as the statement in Nicholas Exhibit A which is a draft of the complaint.

I just compared it quickly and they appear to be identical. I assume that Mr. Figueroa's testimony that he got information from Patrolman Santoli was based on his review of the complaint prior to his testimony.

Mr. Figueroa candidly stated that he remembered very few details of the episode and relied on the refreshed recollection or, in some instances, other testimony on standard procedures.

In any event, the complaint refers to information obtained by Mr. Gallo from Patrolman Santoli. There is nothing inconsistent with anybody's testimony with the findings I have made in that respect.

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It goes on to say, "Information from Patrolman Patrick Santoli establishing that the aforesaid counterfeit notes were found in an automobile occupied by the defendants at the time of their arrest".

That statement can perhaps be read two ways: one, that the notes were found in the automobile at the time of the arrest. I think it's more appropriate to read it -- it fits the sentence better, the construction of the sentence -- to read it that the notes were found in an automobile and the clause following that identifies the automobile, that is the automobile is which was occupied by the defendants at the time of their arrest.

The qualifying clause clause at the end of that sentence identifies the automobile. It doesn't indicate where the notes were when they were found at the time of arrest. It doesn't indicate the time at which the notes were found; that is, the time of the arrest.

Gentlemen, I have not heard from you on the remaining aspect of the supression motions, that is, the supression of the confessions because they were obtained in effect involuntarily after the defendants had been promised that they wouldn't be prosecuted.

I would like to defer on that until the first think tomorrow morning. I would like to hear from counsel

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on that the very first thing tomorrow morning. I will rule on it then.

As far as the speedy trial problems are concerned, the motions to dismiss the indictment because of the failure to comply with the Speedy Trial Act and rules, I will deny those motions.

Mr. Nicholas's absence from April of 1974 until May of 1977 is completely unexplained. The period of time from May 23, 1977 to date, although more than 90 days, the fact that there was a delay in moving him from Massachusetts to New York and a further delay occasioned by the hearings which we have been having for several days, if not a couple of weeks on these motions, satisfies the requirements of the Southern District rule.

As to Mr. Brown, there have been, it's quite clear, periods of time in the past when his presence was known to the U.S. Attorney for the Southern District, but each of those occasions when efforts were made to find Mr. Brown thereafter he was not found and he also failed to appear on occasions when he was supposed to appear.

I find that he was unavailable through no fault of the U.S. Attorney.

We will adjourn until a quarter to ten tomorrow

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morning at which time I will hear arguments on what I call the deal supression motion. I hope I will be able to rule on that promptly.

I am quite clear that,although I will hear arguments on it tomorrow morning, if anybody wishes to argue the motion, if I grant the motion it will be a motion to supress the statements only, and I would not grant a motion to dismiss the indictment.

I mention that because if I do grant the motion to supress, Mr. Stim, we would still proceed with the selection of the jury and trial after that.

Counsel may argue to me, if anywish, that I should dismiss the indictment, if I am going to grant the motion. All right, yes.

MR. STIM: Can we fix it at ten minutes after ten? I have a motion on the motion calendar before Judge Weinfeld at 9:30.

THE COURT: All right, Mr. Stim. We will expect you at ten minutes after ten.

Mr. Nicholas, you had something?

MR. NICHOLAS: Yes. For the record, your Honor, I would like to submit to the record that I am aware of U.S.C. Amendment 4,54 pertaining to inventory searches. "Even if officer's search of impounding

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automobile which defendant had been driving was an inventory search, search of zippered compartments within closed flight bag found within trunk of auto which disclosed substance believed to be a narcotic, entered a Constitutional area of privacy without a warrant and without probably cause and was an unreasonable search." People v. , 527P 2d 54V.

I would like to state some other things for the record.

THE COURT: Mr. Nicholas --

MR. NICHOLAS: I am not finished.

THE COURT: I know you are not.

Are these things you told me before or knew?

MR. NICHOLAS: I have never brought them up because your Honor kept saying I could bring them up when we finish.

THE COURT: Go ahead.

MR. NICHOLAS: For the record I say these things, your Honor. I would like the record to show that Mr. Figueroa's testimony in the opinion of the defense was not a lie, nor was it distorted facts concerning the arrest. He knew what he was talking about.

Also, the question of collaboration of the U.S. Attorney with the police officers prior to this

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hearing in an effort to sabotage, I use the word myself, to sabotage this supression hearing, your Honor.

All defense testimony speaks that the search was conducted prior to inventory search, your Honor. I would like to make another quote from U.S. versus Chadwick, page 553: "Police are allowed to take items along to the station with the arrested persons." It doesn't say items may be searched prior to that.

I also would like to say it's the defense's opinion that the Court decided to take the word of, the testimony of the patrolman over that of the former U.S. Magistrate, your Honor, who wasn't lying. The Magistrate, Mr. Figueroa, wasn't lying.

Lastly, your Honor, the defense's opinion was that there was no exigent circumstance surrounding the original arrest, your Honor. Everything I say can be substantiated by a polygraph machine which I would intend to have in evidence. It would be submitted for your Honor's consideration at a future time, not submitted into evidence.

I think that is it.

THE COURT: I have taken those things into account in making my ruling.

As far as the polygraph is concerned, your

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counsel, Mr. Stim, can tell you that normally it is not received into evidence. I don't know that it would help me any.

MR. NICHOLAS: I understand that.

One other point.

THE COURT: One other thing. You gave me a memorandum this morning. You asked me not to disclose the contents of this to anybody.

MR. NICHOLAS: I trust you would keep it in confidence.

THE COURT: I want you to know that I can't take this into account in any way unless I can show it to the Government. At least in these proceedings, I can't take it into account.

MR. NICHOLAS: I understand what you mean.

THE COURT: Unless you want me to give this to the Government, I will return it now.

MR. NICHOLAS: I gave it to you and it's up to you to do whatever you want to with it.

THE COURT: What you have in the memorandum, Mr. Nicholas, doesn't really relate to the proceedings going on right now.

MR. NICHOLAS: I understand.

One other thing and I will be through.

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FOLEY SQ., NEW YORK, N.Y. 10007

THE COURT: If you don't want me to act on what is in the letter now, I will hold it for the time being.

MR. NICHOLAS: You can act on it at your convenience.

THE COURT: If I am going to act on it in any way, you will understand that I will need to get your permission to give it to the U.S. Attorney before I do so.

MR. NICHOLAS: Can I think about it and discuss it with you at another time?

THE COURT: Yes. Did you discuss it with Mr. Stim?

MR. NICHOLAS: No.

THE COURT: Maybe you would like to take the paper and discuss it with him.

MR. NICHOLAS: No.

THE COURT: I will hold on to it until I think it will be helpful.

MR. NICHOLAS: Did you receive a copy of this notice to supplement a motion to supress?

THE COURT: I did consider it and it's in the file.

MR. BROWN: For one second, your Honor, I appreciate what you did. I think it was on August 3th or

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UNITED STATES OF AMERICA

- against - 73 Cr. 731
Stewart, D.J.

VINCENT BROWN, et ano.

New York, New York
September 20, 1977 - 11:00 a.m.

- - -

MR. HANDAL: Your Honor, may I make an application?

THE COURT: Yes.

MR. HANDAL: It is that defendant Brown's bail be revoked. As your Honor knows, this is approximately the fifth time that defendant Brown has shown up late for a hearing. If my recollection serves me, the hearings were originally scheduled for August 31 at which time they were scheduled the day before because the defendant Brown was on vacation. They were rescheduled for September 6 at two o'clock. The defendant Brown showed up at approximately five o'clock. The hearing yesterday, September 19, the defendant Brown was approximately forty-five minutes late for the morning session and was again late for the afternoon session. This morning he has approximately been late for about one-half hour.

There is the inconvenience caused the Court and the inconvenience caused the co-defendant and the inconvenience

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THE COURT: All right, gentlemen. We will take a short recess.

(Recess.)

THE COURT: On the motion to suppress the confessions or to dismiss the indictment because of the contention that the agents and the assistant U.S. attorney promised the defendants they wouldn't be prosecuted, it seems to me the question is--I guess it is a two-fold question in a way.

First of all, what did the agents and Mr. Figueroa say to Mr. Nicholas and Mr. Brown; and secondly, what did the defendants resonably understand the agents and the prosecutor to be saying to them. I suppose involved in that is whether or not the agents and the Government lawyer were deliberately trying to mislead the defendants or hoping that the defendants would be misled.

First, we have the testimony of the two agents, Traveglino and Callo. Mr. Traveglino testified when he introduced Nicholas, Nicholas agreed to cooperate. He also testified that first he said, "I never promised anyone immunity." Then he was asked whether he said anything to Mr. Nicholas about his cooperation being used against him. Traveglino answered, "I don't know. I would interpret it as immunity. However, I did not tell him anything like that."

"Q Were you present when anyone made that state-

ment.

"A No, sir."

That was on cross examination. Mr. Gallo testified that when he interviewed Nicholas that Nicholas indicated that he wanted to cooperate. Gallo said that "Nicholas gave him a statement" and also said he would pass on to the U.S. attorney whatever happened, that is, whatever Nicholas said or did. "Any cooperation would be taken into account."

He further said that "Mr. Nicholas was coming on strong about promises that there would be no prosecution. I could not grant him that. I told him that the information he gave me would be brought to the attention of the assistant." He further said that "no promise of no prosecution was made and that there was no deal." He further said that he never promised that they would never be indicted or anything like that nor did Mr. Figueroa in his presence, but only that their cooperation would be brought to the attention of the Court. He further said that he did not say that their statements would not be used against them.

Mr. Figueroa indicated that as to some of the events, he didn't have a clear recollection. He said, "It was office policy not to make any firm commitments other than that should they be indicted a good word would be put in for them. The nature of their cooperation would be expressed

to the sentencing judge. It probably took something along that line." He said he had "no distinct recollection of actually what I told them at that time other than I have no recollection of deviating from the office procedure in this particular matter."

"Q Did you ever tell them that they would not be indicted for the offenses?

"A No.

"THE COURT: Are you sure of that?

"THE WITNESS: I am pretty sure, your Honor.

"THE COURT: What does 'pretty sure' mean?

"THE WITNESS: That I have no recollection, but I would have remembered I told them."

He further said that he denied that he had ever acknowledged in any way, shape or form that if either of them cooperated that he would not be indicted. Again, he denied that in any of his discussions he had told them that prosecution would be dropped or they would not be indicted. Finally, he said that he remembers it is only twice in his experience he considered offering immunity from prosecution to anyone. On one of those occasions it was approved and in another one it was denied. This was not one of those occasions.

He further conceded that "it was a possibility that it could have been mentioned that they would not be in-

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dicted because a criminal information would be filed." He said first, "I don't know whether that was mentioned." Then he was asked again: "Q That is a possibility, is it not?" His answer was: "I suppose it is." He went on to say, "Anything is possible." In that connection, Mr. Nicholas testified and said, "I am certain we had an understanding that whatever was said--" he is talking now about his conversation with the agents--"I am certain we had an understanding whatever was said would not be used against us in no prosecution proceedings.

"Q The agents told you that?

"A This was our agreement.

"Q Did the agents say that to you?

"A I am saying this was our agreement.

"Q How did that agreement come about?

"A Because they affirmed it. This is the only reason that everything else came about and on the polygraph examination it will show that it is the truth."

Later he referred to an understanding. "Whatever I told the agents, whever I told them, it was after we had an understanding that whatever I said would not be used against me or my co-defendant in any prosectuion proceedings." As to what Mr. Figueroa said, he was asked: "Q Did he tell you then that, by the way, what the agents agreed with you on

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is okay with me. We are not going to charge you. Is that what he told you?

"A I can't quite recall the words of Mr. Figueroa.

"Q What did Mr. Figueroa tell you?

"A Whatever he said, he left the impression that in exchange for this the prosecution would be--however it was going to be done, whether it was going to be dismissed--I didn't exactly know how he was going to do this in detail, but that is what it amounted to.

"Q You asked him if the case was going to be dismissed?

"A No. I am not saying that I asked Mr. Figueroa nothing like that directly. Everything was done through the agents. The only thing Mr. Figueroa did was to acknowledge it.

"Q How did he acknowledge it? What did he do

"A He acknowledged it. That is the word I am using.

"Q What did he acknowledge?

"A he acknowledged that he understood it was a deal. I hate to use that kind of word.

"Q You said he understood that it was a deal. What was that deal?

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"A In exchange for the plates or a large quantity of counterfeit notes, that no proseuction would be taken against me and my co-defendant.

"A Did Mr. Figueroa tell you this?

"A He acknowledged it.

"A How?

"A He acknowledged it.

"Q I am asking you how he acknowledged it.

"A Number one, by releasing us on personal recognizance bond. We had a $50,000 cash bond twenty-four hours before that."

There is nothing in the record which indicates to me that there was a prior $50,000 cash bond. Going on--

"Q Did he ever say to you, Mr. Figueroa, that the deal was that we won't prosecute you at all for this offense?

"A Not in them words, no.

"Q Did any of the agents ever say to you, 'Okay, Mr. Figueroa, we won't prosecute you at all for this offense?'

"A In exchange for our cooperation, gathering plates or a quantity of the counterfet notes."

Later Mr. Brown testified that he first heard about the deal Mr. Nicholas referred to from Mr. Nicholas. He testified:

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"Q Mr. Gallo never told you that you would not be prosecuted for the offense?

"A Not at that time when it was being explained.

"Q Didn't Gallo tell you that your cooperation would be passed along to the U.S. attorney?

"A No, sir. He didn't just say that to me."

He went on to say, "I said it to Gallo that is--the deal is that I won't be prosecuted. I said it to Gallo as well as to Mr. Figueroa. Mr. Gallo and two secret service agents were present when I explained the deal. I don't want to be charged with this. Is that what you are saying? Yes. We have to take it down to the prosecution office and get a verification, but I already spoke to them earlier.

"Q You said that to Gallo?

"A Gallo told that to me. When he and the other secret service were present, I said, 'In other words, I won't be charged,' and he just said, 'Yes,' or words to that effect. I told Gallo words to that effect. I am not sure of my wording to him. I did say to him to verify not only what Nicholas explained to me but even though Joe Gallo did say to me the facts of the deal.

Brown was asked: "Q Did he--" meaning Mr. Figueroa--"ever tell you that you would not be prosecuted if everything worked out?

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"A He didn't tell me I wouldn't be prosecuted, no. He said if everything works out--wait. Not at that time, no. Let's see what happens, if everything works out. Later we went into that.

"Q What he said was that we can't make you any promises at this time and see what happens as we go along?

"A No, from his wording to me in laymen's terms, 'If you help Mr. Figueroa and help the secret service and come up with what they want, deliver what they want, everything will be okay I will take care of it personally. I am giving you my word.' That is what he said to me personally, Mr. Figueroa."

Finally, we have the testimony of Mr. Curley who had represented Mr. Brown during the course of these proceedings. Mr. Curley testified from his own notes. He was testifying about a conversation that he had with Mr. Brown and Mr. Figueroa. He said that Brown told him that he had been told if he cooperated, he would not have to plead guilty. Then he said Mr. Brown backtracked. In his testimony he was reading from his file. He said, "After discussions it appeared to me that the defendant was changing his explanation and stated at that time that it was his understanding that he would not have to plead in the higher court or to an indictment. He then backtracked and said he had never been told

that he would not have to plead guilty. It was explained to him that there was basically no higher court in the federal system and there was no difference as to whether he pled guilty under an indictment or an information.

"Mr. Brown stated he was not aware of these distinctions and thought he was being penalized by having to plead to an indictment. I told Mr. Brown that I thought he had changed his story, since he seemed to be convinced at the time that there would be no promise that he would not be prosecuted and in effect he would have to plead guilty to the charges, that the matter was to be dropped. Mr. Figueroa again stated that he would bring his cooperation to the attention of the sentencing judge."

Mr. Curley testified not from his notes but, "This refreshes my recollection to the extent that there was this confrontation between Mr. Brown and Mr. Figueroa in my presence which came about at my request. I had previously advised Mr. Figueroa that there had been this serious misunderstanding between Mr. Brown and Mr. Figueroa and it would be in everybody's interest to resolve this matter as quickly as possible whenever Mr. Brown would be available. Mr. Figueroa came down and said he had not promised that he would not have to plead guilty. There was some discussion of this and Mr. Brown indicated that he was not told that he would

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not have to plead to an indictment. There was a discussion. 'Did he tell you you wouldn't have to plead to an indictment, that it might be in the form of an information rather than an indictment?' At that point Mr. Brown was not sure as to how exactly Mr. Figueroa worded that part of the conversation.'

He went on. He mentions, "Brown seemed to indicate to me that perhaps he and Mr. Figueroa did not understand each other and he at the time was satisfied that he thought he would not have to plead to an indictment or the case would not be presented to a higher court while Mr. Figueroa never indicated to him that the charges would not be prosecuted or that he would have to plead or rather that he would not have to plead to charges. Throughout that discussion Mr. Figueroa maintained that he had not promised Mr. Brown that he would not have to plead to the charges and at this point Mr. Brown indicated that he might have misunderstood some of the terms or might have understood the meaning in a different fashion. The conversation switched to a different topic, basically the extent of his cooperation and the time to file a motion to suppress."

Mr. Curley was not present when Mr. Gallo and Mr. Traveglino interviewed Mr. Brown and Mr. Nicholas. However, the testimony of the two agents and of Mr. Figueroa is consistent in that they made no promises that their state-

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ments would not be used against them and they would not be prosecuted. The testimony of Mr. Nicholas as to his discussions with the agents and later with Mr. Figueroa is somewhat inconsistent internally. He refers to agreements being affirmed, to understandings being acknowledged, to impressions. It seems clear, as I have indicated previously, that Mr. Brown learned about whatever arrangment had been made first from Mr. Nicholas. Possibly Mr. Nicholas was explaining the arrangement to Mr. Brown and was trying to explain away the cooperation which he had extended. Perhaps he was trying to report accurately what he had understood happened. Perhaps he had an imperfect recollection of what happened.

In any event it is clear to me that Mr. Nicholas first informed Mr. Gallo and Mr. Brown of whatever arrangement he, Mr. Nicholas, had thought had been arrived at. It is not clear to me that when Mr. Brown tried to get assurances from Mr. Figueroa as to what the deal was that Mr. Figueroa made any definite commitment of no prosecution. On the contrary, it is my finding that the agents and Mr. Figueroa did not make any commitment, in so many words or words that were intended to make a commitment of no prosecution, but rather that the most they did was indicate that cooperation would be brought to the attention of the Court.

I also find that there was no effort made of the

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agents or Mr. Figueroa intentionally to mislead. They did not intend to create the impression, the mistaken impression, that they would not seek prosecution. The fact that the defendants were released on their own recognizance and apparently in the case of Mr. Brown, at least one of the defendants and perhaps both, that they got free tickets on the airplane, I don't find that inconsistent with the procedures that are followed from time to time in the case of cooperating witnesses.

One footnote, once again I note that the contention raised by the defendants with respect to no prosecution arrangement was raised at the last moment in the course of the presentation of the motion to suppress the counterfeit money, for whatever that is worth. Consequently, I find the Government has met its burden with respect to all of the motions that have been raised and all of them are denied.

MR. STIM: I respectfully accept, your Honor.

MR. NICHOLAS: If your Honor pleases, I would like to address the Court, please.

THE COURT: I will adjourn for lunch at this time. We will resume at a quarter to two and we will begin at that time by selecting a jury. Mr. Nicholas, did you have something you wanted to say?

MR. NICHOLAS: Yes, I did. It will only take me

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee	:	ATTORNEY'S AFFIDAVIT
-vs-	:	DOCKET NO. 76-1485
JUNE BUFFHAM,	:	
Defendant-Appellant	:	

Emil M. Rossi, being duly sworn, depos[illegible]s a[illegible]

1. I am an attorney duly admitted to prac[illegible] in the Courts of the State of New York and in the United States Court of Appeals, Second Circuit. I represent the appellant on the appeal of her conviction in the United States District Court, Northern District of New York.

2. I submit this affidavit as proof of service of the Brief and Appendix in this appeal on Assistant United States Attorney Joseph Matthews.

3. The United States Court of Appeals, Second Circuit, entered an order that the Brief and Appendix for appellant be filed on or before December 15, 1977.

4. On December 15, 1977, I had a phone conversation with Assistant United States Attorney Joseph Matthews wherein he stated that he would come to my office on Friday, December 16, 1977, to pickup the Brief and Appendix. Based on this phone conversation, I did not mail the Brief and Appendix to Mr. Matthews.

5. On Friday, December 16, 1977, Mr. Matthews came to my office and my secretary gave him the Brief and Appendix pursuant to my instructions.

Emil M. Rossi

Sworn to before me
the 6th day of January, 1978.

Notary Public

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-vs-

JUNE BUFFHAM,

Defendant-Appellant

ORIGINAL

ATTORNEY'S AFFIDAVIT

JERRY, ROSSI, TISDELL & MOORE
ATTORNEYS AND COUNSELLORS AT LAW
SUITE 615
UNIVERSITY BUILDING
SYRACUSE, NEW YORK 13202
(315) 474-2981

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,	:
Plaintiff-Appellee	:
-vs-	: AFFIDAVIT
JUNE BUFFHAM,	:
Defendant-Appellant	:

Carol Moser, being duly sworn, deposes and says:

1. I am employed as a secretary in the law offices of Jerry, Rossi, Tisdell & Moore.

2. On December 15, 1977, Mr. Emil Rossi, a partner in the aforementioned law office, stated to me that Assistant United States Attorney Joseph Matthews would come to the office on December 16, 1977 to pick-up the Brief and Appendix for Appellant June Buffham. Mr. Ross left the Brief and Appendix at my desk.

3. On December 16, 1977, Mr. Matthews came to the office and I personally delivered to him the aforementioned Brief and Appendix.

Carol Moser

Sworn to before me
the 6th day of January, 1978.

Notary Public

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-vs-

JUNE BUFFHAM,

Defendant-Appellant

ORIGINAL

AFFIDAVIT

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